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Utah Supreme Court

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Leonard W. Elton; Attorney for Defendants and Respondents;

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
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THIRTEENTH AND WASHINGTON STREETS CORPORATION,
a California Corporation,
Plaintiff and Appellant,

vs.

CLARENCE C. NESLEN, ELLIOTT
W. EVANS, H. D. LOWRY, and
MARVIN J. BERTOCH,
Defendants and Respondents.

BRIEF OF RESPONDENTS

LEONARD W. ELTON,
Attorney for Defendants
and Respondents.

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IN THE SUPREME COURT
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THIRTEENTH AND WASHINGTON STREETS CORPORATION,
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Plaintiff and Appellant,

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CLARENCE C. NESLEN, ELLIOTT
W. EVANS, H. D. LOWRY, and
MARVIN J. BERTOCH,
Defendants and Respondents.

Case No.
7875

STATEMENT OF FACTS

The respondents agree generally with the appellant's Statement of Facts. It is believed, however, that the Court would be aided by a reference to some additional facts and by a brief comment on some of the facts set out by appellant.

The respondents paid rent in full for the entire period of their occupancy of the premises and there is no contention on the part of the appellant that there was a delinquency in this regard. The action seeks only to recover rent for a period subsequent to the vacating of the premises by the respondents (R. 1).

During the period of the occupancy, complaints as to conditions in the building were made continuously and frequently (R. 38, 72). They were made not only by the respondents themselves (R. 38, 72) but by their employees (R. 58) as well as by other tenants in the building (R. 64, 97). It appears that the complaints were made to various representatives of the lessor, including Mr. Kipp, Mr. Smith, Mr. Dayton and Mr. Kotila (R. 38, 58, 64, 72, 73). The complaints covered a variety of grievances including the failure to keep the building open after 8 P.M. in the evening (R. 62, 68), inadequate heat during both winters (R. 39, 57, 58, 64), unsatisfactory restroom facilities (R. 39, 57, 58, 63, 107), the hazards and inconvenience of using the stair well resulting from lack of light (R. 33, 63, 69, 107), lack of cleanliness (R. 107), the leaving of beauty parlor supplies and janitorial supplies on the staircase (R. 32, 69), and permitting the operation of the beauty parlor in the foyer of the building with the attendant obnoxious odors (R. 35, 70). The complaints covered conditions the existence of which made the premises unsuitable for a law office. Furthermore, the conditions complained of were such that the building could not be held to be a

“First Class” building as lessor’s agent represented it would be.

The only other attorney in the building, Mr. Herbert B. Maw, also testified to the existence of conditions that were not compatible with the effective operation of a law office. He termed the situation “humiliating” and “uncomfortable” and testified that the conditions remained unchanged (R. 61-66).

Notwithstanding the variety and frequency of the complaints, little was done to remedy the situation (R. 64). The lack of remedial action appears to have been attributable to the lessor’s representatives in New York City rather than the local agents (R. 64, 73, 102).

The written lease between the parties contained the following specific provision :

“25. The building will be open from 8 A.M. until 12 P.M. Tenants desiring the use of office before or after these hours should apply at building office for permission.” (R. 17).

Notwithstanding this specific provision, the building was closed every evening at about 8 P.M. (R. 92, 105, 68, 29, 62).

During the period of their occupancy of the premises, the respondents made inquiries for suitable space in other office buildings. They were, however, unable to locate suitable space until shortly before they moved out of the leased premises (R. 48, 74).

ARGUMENT

POINT I.

The facts as found by the lower court constitute a constructive eviction.

The acts and omissions of appellant which the Court found to have been committed or omitted are set out in Findings No. VI to and including No. XIII (R. 113-4). These acts were cumulative and continuing. Perhaps no one of them, standing alone, would have been sufficient to constitute a constructive eviction but all of them together, did in the opinion of respondents as well as the trial Court, constitute such eviction.

Appellant contends that acts of omission do not constitute an eviction, however, the authorities set forth in appellant's brief do not support this contention. Furthermore, there were in this case more than omissions. There were, in addition, certain affirmative acts committed by appellant, an example being the locking of the building with the result that the building was not open to clients of respondents after 8 P.M. and on Sundays and holidays. The appellant also rented space in the lobby of the building to the beauty parlor operator. As a result of the operation of this parlor, the lobby passageway and stairway, which were required to be used by respondents and their clients, were obstructed (Ex. 1 and 2). As a further result of the operation of the beauty parlor, obnoxious fumes and odors were created which permeated respondents' office suite.

Appellant contends that respondents did not show that the appellant's actions were made with intent to evict. The intention of the landlord is immaterial if the acts or omissions of the landlord interfere with the beneficial enjoyment of the premises by the tenant.

"A man is presumed, in law, to intend the natural and probable consequences of his acts; and, therefore, acts or omissions of the landlord which are calculated to, and do, make it necessary for the tenants to remove from demised premises constitute a constructive eviction."

36 C. J. Landlord and Tenant, Sec. 989, Page 263.

The following statement from an Oregon case in our opinion correctly states the law:

"Upon these questions an examination of the authorities disclose a wide diversity of judicial opinion but we think, except in certain cases where the intent of the landlord is valuable in determining the nature of the acts performed, the intent is immaterial, since the vital fact to be determined is the interference with the tenant's beneficial enjoyment of the premises. And in the case at bar, if the action of the landlord did work such an interference, the intent with which he acted is of no importance."

Hotel Marion Co. v. Waters (1915), 77 Or. 426, 150 Pac. 865, at page 868.

The Supreme Court of Utah in discussing the subjects of actual eviction and constructive eviction quotes from Black's Law Dictionary as follows :

“Actual eviction is an actual expulsion of the tenant out of all or some part of the demised premises; a physical ouster or dispossession from the very thing granted or some substantial part thereof. * * *

“Constructive eviction. * * * With reference to the relation of landlord and tenant there is a ‘Constructive eviction’ when the former, without intent to oust the latter, does some act which deprives the tenant of the beneficial enjoyment of the demised premises or materially impairs such enjoyment * * *.”

Barker v. Utah Oil Refining Co. (1947), 111 Utah 308, 178 P. (2d) 386 at page 388.

The appellant contends that the results of the conditions complained of were not grave, substantial and permanent. They were indeed grave and substantial to the respondents who, together with their employees and clients had to face the situation daily during the period of more than two years they occupied the premises. There was not, nor could there be, any beneficial enjoyment of the premises under the conditions which existed during the entire period of respondents' occupancy. The conditions described by respondent Evans

(R. 23 to 55), by respondent Neslen (R. 66 to 81), by Max K. Mangum, who occupied a portion of the space leased, and who is a lawyer (R. 106 to 109), by Mrs. Beverly Fisher, a stenographer employed in the office of the respondents, at the time they occupied the premises (R. 56 to 60), and by Herbert B. Maw, a lawyer, who also occupied space in the building, cannot under any circumstances be correctly classified as not grave and substantial. Mr. Maw outlined the procedure that had to be followed in meeting clients at his office during evening hours or on Sundays or holidays. He described the situation and summed it up by saying:

“Yes, it was a humiliating process.” (R. 62, line 30).

The law is a dignified and learned profession and the offices of lawyers are usually located in “First Class” office buildings with clean accommodations and surroundings which meet the approval of the public. Certainly the conditions which appellant created, or permitted to exist in the building were grave and substantial and interfered with the use and enjoyment of the premises by the respondents for the use which said premises were intended, which, as the lease specifically provided, was for an attorneys’ office (R. 8).

Appellant contends that it cannot be held responsible for the fumes and odors arising from the beauty parlor which it permitted to occupy a portion of the foyer or lobby and for the obstructions which the opera-

tion of said beauty parlor caused in the lobby and stairway, which respondents, their employees and clients were required to use on occasions. It would not appear reasonable to permit the landlord to escape from the consequences of leasing space to a beauty parlor without making adequate provision for the elimination of obnoxious odors and fumes, yet practically the only source of ventilation was the stairway going to the upper floors (R. 100). Under the circumstances, the obnoxious odors and fumes inevitably filled not only the lobby of the office building through which respondents' clients had to pass but also permeated to the portion of the building occupied by respondents. The evidence is without dispute that the equipment used in the beauty parlor, of necessity obstructed the hall and passage way and was in plain view of persons waiting for elevators to go to the upper floors of the building (Ex. 2). The appellant must also be deemed to be chargeable with permitting this condition to exist.

Numerous cases have decided that under particular facts landlords become responsible for actions of other tenants and nuisances created by other tenants and that such actions constitute constructive eviction. In an early Colorado case it was held that a tenant was justified in abandoning his rooms and treating himself as evicted, where his landlord rented adjacent rooms to lewd women, knowing the purpose for which the rooms were to be used, and thereafter, on complaint as to their noisy and offensive conduct, took no steps to remove them.

Certainly, where the landlord, as in this case, rents a portion of the building, to a business, the operation of which naturally causes obnoxious fumes and odors, without making any provision for ventilation of the space so as to prevent the fumes and odors from going into the remainder of the building to the annoyance of other tenants, the landlord cannot escape the natural results from the operation of business by that tenant.

The landlord attempts to escape from the admitted annoyance and discomfort caused by the operation of this beauty parlor by attempting to pass the blame for its location to Mr. Neslen, one of the respondents. Appellant's brief refers to a letter written by respondent Neslen on behalf of the operators of the beauty parlor. This letter was written by Mr. Neslen in his capacity as attorney representing clients. The reference in the letter to the desirability of moving the beauty parlor from the department store to the lobby of the office building was made at the instance of the clients and represented their proposal and desire in the premises (R. 75, 76). The suggestion, however, has no relevancy to the question here involved, which is as to whether or not the beauty parlor and its operation constituted an obstruction and interference with the respondents' enjoyment of the demised premises. Specifically, the question is as to whether or not the use of the hallways,

stairways and passageways by the beauty parlor for the storage of their supplies and equipment and the creation of obnoxious odors created conditions that were detrimental to the enjoyment of the premises by respondents for the purpose for which they leased the premises.

Appellant contends that the conditions must be not only grave and substantial in order to constitute a constructive eviction but that they must also be permanent. The bad conditions were in fact permanent in one sense, in that they existed for more than two years during which period the respondents occupied the premises. An examination of the authorities cited by appellant shows that they do not support the theory that the acts of the landlord must be permanent in the sense that the situation created cannot be remedied by the landlord.

In a New York case it was held that there was a constructive eviction where the landlord notified tenant that use of passenger elevator in an apartment building by tenant's governess would no longer be permitted. The landlord was not authorized to refuse to allow governess to use the elevator, and the tenant accepted the notice as an ultimatum.

Park Ave. M. E. Church vs. Barrett, 30
N.Y.S. 2nd 667.

It is contended by the appellant that respondents did not move from the premises within a reasonable

time because of the conditions and that they therefore waived their right to move. This contention seems very inconsistent with the strenuous argument to the effect that respondents at no time had the right to move. The facts supported by the record and found by the lower court are that respondents moved as soon as they found suitable quarters (R. 38, 73 and 114). Up to the time that respondents moved the conditions complained of had not been remedied.

The following citations support the position of the respondents in staying in the premises until they were able to find suitable space to meet their needs:

Where the lessee continued in possession over a year it was held that lessee did not waive dust and smoke nuisance from lessor's heating plant, where plant was not operated much of the time and lessee continually complained thereof the rest of the time.

Frosh v. Sun Drug Co., 1932, 91 Colorado 440,
16 P. (2d) 428.

In the above case the Court stated on page 430 of
16 P. (2d) :

“It is said that the company continued in possession and paid rent for more than a year, and thereby waived the injury. During much of this time, however, the heating plant was not in

operation, and there is ample evidence that during the remainder the company was continually complaining and demanding relief, and that Frosh was continually promising action. Under such circumstances, there is no waiver." (Several cases are there cited).

In another Colorado case, *J. C. Penney Co. vs. Birrell* (1934) tried upon the theory of constructive eviction, the question was raised as to whether the defendant had waived any right to claim an eviction by his failure to abandon within a reasonable time. The defendant, who successfully contended that he had been evicted by acts of the plaintiff, delayed moving from the premises from March, 1930, to July 28, 1931. He looked for other quarters, but found none available in the business section and then decided to put up his own building and kept possession of the leased premises until his building could be erected. He was delayed by financing, building and weather conditions. The Court stated:

"The case was tried upon the theory of constructive eviction. Plaintiff seeks a reversal by contending there was no eviction, and further that if it could be so considered, that defendant waived any right to claim an eviction by his failure to abandon within a reasonable time. What is a reasonable time, depends solely upon the facts peculiar to the case. The facts surrounding the latter claim were fully heard and considered by the Court, and being determined in defendant's favor upon sufficient evidence, will not be disturbed."

J. C. Penney Co. v. Birrell (1934), 95 Colorado 59, 32 Pac. (2d) 805 at page 806.

In a Massachusetts case, Rome v. Johnson (1931), 174 N.E. 716, the difficulty of finding another location suitable for tenants' business was alluded to as a circumstance to be considered by the jury in determining whether the tenant had acted with reasonable promptitude.

Although there is no direct evidence to that effect, it is believed the Court could reasonably take judicial notice of the fact that during the period in question, office space, suitable for several practicing lawyers, was extremely critical. The trial judge undoubtedly considered this as one of the circumstances which justified respondents in removing from the premises when they did.

POINT II.

The findings of fact of the lower court are justified by the evidence.

Appellant contends that it was error for the lower Court to include in Findings of Fact XI, XII, and XIII that the acts and omissions of appellant were "greatly to the detriment of Defendants' professional practice." Appellant recites the evidence on the subject and concludes that since the respondents did not and could not

testify as to the loss of any clients or examples of the loss of money as the result of the conditions, that these Findings are erroneous.

It is the contention of the respondents that the Court might make such conclusions from the facts established as may be reasonable and that the complained of clauses in the Findings were reasonably concluded from the facts proven.

The Utah Supreme Court in discussing the subject said:

“The errors urged are * * * (2) that they are ‘not findings of fact but conclusions from facts shown.’ * * * The second complaint is no objection at all. Findings should be limited to the ultimate facts to be ascertained, and such findings are none the less findings of fact because drawn as conclusions from other facts.”

Fuller v. Burnett (1926), 66 U. 507, 243 P. 790.

If the inclusion of the clause, which appellant contends there is no evidence to support, in the three Findings of Fact was error on the part of the lower Court said error is harmless error because the judgment can be supported by the other findings.

It is finally contended by appellant that there is no evidence presented to substantiate Finding XVII, “That

the defendants moved from and vacated said premises by reason of the acts and omissions of the plaintiff as soon as they could find suitable quarters for their use as attorneys' offices."

There was no evidence offered to contradict the testimony of Mr. Neslen and Mr. Evans on this subject. Under these circumstances it is submitted that there was evidence to support the Finding.

In support of respondents' contention that the premises were vacated within a reasonable time, the following facts and circumstances are reiterated:

- (a) The premises were occupied and rent paid therefor for more than two years;
- (b) During this entire time, complaints were made frequently and continuously to the landlord setting forth intolerable conditions;
- (c) During this entire time promises were made on the part of the landlord that the conditions would be remedied;
- (d) The conditions were in fact not remedied during respondents' occupancy;
- (e) The respondents vacated the premises when suitable space became available in another building.

These are the facts as supported by the evidence and they support the Findings made by the trial Court that the premises were vacated within a reasonable time.

SUMMARY AND CONCLUSION

The facts found by the Lower Court constitute a constructive eviction justifying the respondents vacating the leased premises and the Findings of Fact of the Lower Court are justified by the evidence and there are sufficient Findings of Fact to support the Conclusions of Law and the Judgment of the Lower Court.

The Judgment of the Lower Court should be affirmed.

Respectfully submitted,

LEONARD W. ELTON,

*Attorney for Defendants
and Respondents.*